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LEGAL ISSUES



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Legally Speaking — Round-up of Library-Related Legislation in the 109th Congress

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The past few months have seen a spate of library-related legislation in Congress. The new trademark bill is advancing, the **PATRIOT Act** has been renewed, yet the new **Patent Act** still languishes in the House of Representatives. This column will provide an update on these library-related bills.

In the September Issue of *Against the Grain*, I wrote about the **Federal Trademark Dilution Revision Act of 2005**.¹ The bill was passed by the House of Representatives on April 19, 2005. Unfortunately, the bill languished in committee in the Senate for a very long period of time. However, the bill was finally reported in the Senate on February 27, 2006. On March 8, 2006, the Senate passed an amended version of the **Federal Trademark Dilution Revision Act of 2005**.

When the House passed the bill, the following situations were excluded from liability:

- (A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.
- (B) Fair use of a famous mark by another person, other than as a designation of source for the person's goods or services, including for purposes of identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.
- (C) All forms of news reporting and news commentary.²

An early version of the bill had also excluded noncommercial use of a designation of source. This provision was part of the agreement created by the **International Trademark Association** and the **American Intellectual Property Law Association**. However, the final version of the bill passed by the House of Representatives eliminated noncommercial use of a mark. The version passed by the Senate has restored "Any noncommercial use of a mark"³ as being excluded from liability. Because of the difference between the two bills, H.R. 683 will now head to a conference committee to resolve the difference.

As I reported in September, the House of Representatives was also working on a new patent act.⁴ There has been no new information on this bill for several months. On June 19, 2005, and again on September 15, 2005, hearings were held by the House Subcommittee on Courts, the Internet and Intellectual Property. At this point, no further action has been taken.

The big news in recent months has been the renewal of the **PATRIOT Act**. Although the library community was the first to protest the **PATRIOT Act**, many of the provisions have become increasingly unpopular. As a result, there was a fierce battle in the waning days of 2005, as 16 provisions of the act were due to expire on December 31 of that year. The Senate passed a revised version of the act with some additional protections, while the House of Representatives passed a renewal of the act in its original form.⁵

When the bill went to the Conference Committee to determine its final form, the Senate provisions were removed, leaving the house version in its entirety. Many members of the Senate were very unhappy with the final language of the bill. Led by **Senator Russell Feingold** (D-WI), a bipartisan group of Democrats and Republicans blocked final passage of the revised bill with a filibuster in the Senate. From December 16 to December 21, this filibuster shut down all business on the floor of the Senate.⁶ Senators **John Sununu** (R-NH), **Larry Craig** (R-ID), **Lisa Murkowski** (R-AK), and **Chuck Hagel** (R-NE) broke with their party and joined the bipartisan filibuster.⁷

On December 21, with the holidays and the expiration of the **PATRIOT Act** looming on the horizon, the Senate proposed a six-month extension of the **PATRIOT Act** in order to resolve the dispute. However, **James Sensenbrenner** (R-Wis.), Chairman of the House Judiciary Committee, did not agree. On December 22, the House and Senate agreed to extend the statute until February 3, 2006.⁸ The two chambers were not able to resolve their dif-

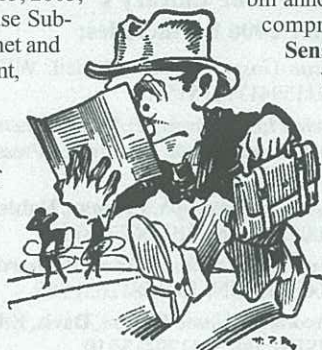
ferences by this date, so the act was again extended, this time until March 10, 2006.⁹

On February 9, 2006, the four Republicans who were opposed to the House version of the bill announced that they had reached a compromise with **Representative Sensenbrenner**.¹⁰ Although **Senator Feingold** again attempted a filibuster, the absence of bipartisan support caused him to relent on February 16.¹¹ Finally, on March 2, 2006, the Senate passed the **PATRIOT Act** reauthorization by a vote of 89 to 10.¹² On March 7, 2006, the House approved the bill by a vote of 280 to 138, "just two more than needed under special rules that required a two-thirds majority."¹³

The bill made all sections permanent, except for the roving wiretaps allowed by section 206 and the production of business records in section 215. These sections now have a four-year sunset, and unless renewed by Congress will expire on December 31, 2009.¹⁴ Some of the changes in the **PATRIOT Act** include:

- Amends section 215 to require that only the director, the Deputy Director, or the Executive Assistant Director for National Security may apply to the FISA court for "an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person. . . ."¹⁵
- Recipients of National Security Letters will be able to request judicial review, and may also challenge the non-disclosure provisions of the NSL.¹⁶
- The revised act clarifies that recipients of an NSL may consult others in their organization in order to carry out the requested actions.¹⁷ The names of all individuals consulted must be disclosed to the FBI. However, the individual may also con-

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sult an attorney,¹⁸ and does not need to disclose this name to the FBI.¹⁹

- Exempts libraries “Libraries functioning in their ‘traditional capacity’”²⁰ from the National Security Letter provisions of section 505. Section 118(D) defines a National Security Letter as being “a request for information under one of the following provisions of law:

(1) Section 2709(a) of title 18, United States Code (to access certain communication service provider records).

(2) Section 1114(a)(5)(A) of the **Right to Financial Privacy Act** (12 U.S.C. 3414(a)(5)(A)) (to obtain financial institution customer records).

(3) Section 802 of the **National Security Act of 1947** (50 U.S.C. 436) (to obtain financial information, records, and consumer reports).

(4) Section 626 of the **Fair Credit Reporting Act** (15 U.S.C. 1681u) (to obtain certain financial information and consumer reports).

(5) Section 627 of the **Fair Credit Reporting Act** (15 U.S.C. 1681v) (to obtain credit agency consumer records for counterterrorism investigations).²¹

Although there are many who feel that the **PATRIOT Act** should not have been renewed, there are still some additional protections that have been included. Under the new provisions, most libraries will not face National Security Letters for circulation records. However, those libraries that provide Internet services may still be subject to the NSL provisions of the **PATRIOT Act**. Only time and judicial interpretation will tell whether the changes in the act have truly removed libraries from the jurisdiction of National Security Letters.

The House and Senate have been working on a number of important bills in the past sev-

eral months. However, each chamber has their own views, which has led to confusion over the final forms of many bills. Hopefully the Congress will be able to pass the Trademark and

Patent bills soon, so that librarians, lawyers, and others who follow these issues will be able to deal with laws that are on the books, rather than speculate on proposals and un-passed bills. 🐼

Endnotes

1. H.R. 109-683 (2005), introduced February 9, 2005; passed by House April 19, 2005.
2. H.R. 109-683(3) (as passed by the House).
3. *id.* (as amended by the Senate)
4. H.R. 109-2795.
5. **USA PATRIOT Act Improvement and Reauthorization Act of 2005** (H.R. 3199).
6. A.S., Congress Extends **PATRIOT ACT** Five Weeks, 37-2 *American Libraries* 9 (February 2006).
7. *id.*
8. *id.*
9. Congress Likely To Extend **PATRIOT Act** By Five Weeks, *Congress Daily at 12* (February 1, 2006).
10. *id.*
11. Feingold Drops Bid To Block Reauthorizing **PATRIOT Act**, *Congress Daily* (February 16, 2006).
12. The Senators voting no on the bill were **Daniel Akaka** (D-HI), **Jeff Bingaman** (D-NM), **Robert Byrd** (D-WV), **Russell Feingold** (D-WI), **Tom Harkin** (D-IA), **Jim Jeffords** (I-VT), **Patrick Leahy** (D-VT), **Carl Levin** (D-MI), **Patty Murray** (D-WA), and **Ron Wyden** (D-OR). **Senator Daniel Inouye** (D-Hawaii) did not vote. Agreement to Conference Report, **USA PATRIOT Act Improvement and Reauthorization Act of 2005** (H.R. 3199), 109th Congress, 2nd Session, 2006 Senate Vote No. 29 (Congressional Information Service, LEXIS, March 2, 2006).
13. House Renews **USA PATRIOT Act** in a Cliffhanger Vote, *Chicago Tribune* (March 8, 2006); available at <http://www.chicagotribune.com/news/nationworld/chi-0603080183mar08,1,6115495.story?coll=chi-newsnationworld-hed>. The renewal was supported by 214 Republicans and 66 Democrats and opposed by 13 Republicans, 124 Democrats and one independent. See, **Laurie Kellman**, Revised Patriot Act wins narrow approval in House, Many Still Opposed Despite Concessions, *San Jose Mercury News* (March 8, 2006); available at <http://www.mercurynews.com/mld/mercurynews/news/politics/14045829.htm>.
14. Press Release, U.S. Department of Justice, Fact Sheet: **USA PATRIOT Act Improvement and Reauthorization Act of 2005**, (March 2, 2006); available at <http://releases.usnewswire.com/GetRelease.asp?id=61784>.
15. H.R. 3199 § 106(a)(3), 109th Congress (2006) (enacted).
16. H.R. 3199 § 3511(b)(2).
17. H.R. 3199 § 106(d)(1)(A) and 106(d)(2)(C).
18. H.R. 3199 § 106(d)(1)(B)
19. H.R. 3199 § 106(d)(2)(C).
20. **Kellman**, Revised **PATRIOT Act** wins narrow approval in House, Many Still Opposed Despite Concessions.
21. H.R. 3199 § 118(d). See also, H.R. 3199 § 119(g), pertaining to auditing reports to Congress. This section uses the same definition for National Security Letters.

Cases of Note — Anna in the Altogether — Lanham Act - False Endorsement

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Anna Kournikova v. General Media Communications, Inc., U.S. District Court for the Central District of California, 278 F. Supp. 2d 1111; 2003 LEXIS 13159 (2003).

Russian tennis babe **Anna Kournikova** appears nude in *Penthouse*. But it's not her!

Yes, you wondered what happened to this one. It was all over the celebrity news, and then it vanished. Well, let's learn about it here.

General Media Communications (GMC) publishes and distributes *Penthouse*, a magazine “known for its sexually explicit pictorials.”

Yes, I suppose one could safely say that.

And of course there's a *Penthouse.com* Website.

I mention this purely for ... well, research purposes.

Penthouse got a call from a photog claiming to have naked pics of the popular babe. The magazine of course jumped all over this with a June, 2002 blaring front cover: “EXCLUSIVE ANNA KOURNIKOVA CAUGHT CLOSE UP ON NUDE BEACH,” and the spine read: “ANNA KOURNIKOVA ... PET OF THE YEAR PLAYOFF.”

The real subject of the photos ... shall we call her Madam X? ... sued and got a settlement in very short order. **GMC** agreed to shred the 18,000 copies of the classic June issue still in their possession.

Then **Anna's** lawyers swung into action, suing for false advertising and false endorsement under Section 43(a) of the **Lanham Act**.

Let's take a peek at that ol' Lanham Act

Section 43(a) of the **Lanham Act** (15 U.S.C. § 1125), forbids false descriptions and false rep-

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